UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

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February 20, 2002

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 01-50786 Melendrez v. Seib
USDC. No. DR-01-CV-1

Enclosed is a copy of the court's decision. The Court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P.'s 39 through 41, and 5th Cir. RULES 35, 39, and 41 govern cost, rehearings, and mandates. 5th Cir. RULES 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order. Please read carefully the Internal Operating Procedures (IOP"S) following Fed.R.App.P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41. Provides that a motion for a stay of mandate under Fed. R. App.P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Case. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed.R.App.P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Sincerely,

Charles R. Fulbruge III, Clerk

By_:_____
Joseph Armato, Deputy Clerk

Enclosure
Mr. Jose Melendrez Jr.
Mr. James F. Gilligan Jr.
Mr. Jason Bradford Libby
Mr. Seth Byron Dennis

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-50786
Summary Calender

U.S. Court of Appeals
FILED
FEB 20, 2002
Charles R. Fulbruge
III., Clerk

JOSE MELENDREZ, JR.,

Plaintiff - Appellant,

versus

Francis E. Seib, Drug Enforcement Administration, Head DEA Agent in charge of Eagle Pass, Texas, in his official capacity; Moses Pena, Drug Enforcement Administration, DEA Agent in Eagle Pass, Texas, in his official capacity; Larry Leon, Drug Enforcement Administration, former DEA Agent in Eagle Pass, Texas, not in San Antonio, Texas, in his official capacity; Tony Quintanilla, Former County Investigator of Zapata County, now a U.S. Border Patrol Agent in Fort Hancock, Texas, in his official capacity; Arnoldo Ramos, Sergeant/Investigative Department of Public Safety in Del Rio, Texas, in his official capacity; UNITED STATES OF AMERICA,

Defendants - Appellees.

Appeal from the United States District Court
For the Western District of Texas
USDC No. DR-01-CV-1

Before KING, Chief Judge, and JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:

Jose Melendrez, Jr., federal prisoner # 06688-059, appeals the dismissal of his claims brought against state and federal law-enforcement defendants under the Federal Tort Claims Act ("FTCA"), 42 U.S.C. & 1983, and Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Melendrez pleaded guilty to a drug trafficking conspiracy charge and was sentenced to prison in 1996. He now seeks damages under the FTCA on grounds that the defendants committed torts of abuse of process and negligent misrepresentation by recommending his prosecution on the conspiracy charge while he was a confidential informant.

The district court correctly substituted the United States for the individual federal defendants with respect to FTCA claims. 28 U.S.C. & 2679(d); Rodriguez v. Sarabyn, 129 F.3d 760, 764 (5th Cir. 1997). The District Court also correctly dismissed the FTCA claims as time barred. Melendrez failed to show that he had provided the defendants with adequate notice of his claim with-in two years of its accrual as required by the FTCA. 28 U.S.C. & 2401(b);

Montoya v. United States, 841 F.2d 102, 104 (5th Cir. 1988). Melendrez also failed to show any trickery or inducement by the defendants that caused him to delay filing his FTCA claim, and he therefore is not entitled to equitable tolling of the limitation period. See Perez v. United States, 167 F.3d 913, 914 (5th Cir. 1999).

The district court correctly determined that Melendrez's &1983 Claims were barred by Heck v. Humphrey, 512 U.S. 477 (1994). Melendrez's damages all arise from his alleged wrongful prosecution and imprisonment, so that his present action necessarily implies that his conviction is invalid. Wells v. Bonner, 45 F.3d 90, 94 (5th Cir. 1995). Accordingly, Melendrez was required to show that his conviction had been set aside or overturned in order for his civil rights action to accrue.

Wells, 45 F.3d at 94. The district court also correctly applied Heck to any Bivens claims that might remain against the federal defendants. Stephenson v. Reno, 28 F.3d 26, 27 (5th Cir. 1994). The Bivens and & 1983 claims were correctly dismissed. Their Dismissal is "with prejudice to their being asserted again until the Heck conditions are met." Johnson v.

McElveen, 101 F.3d 423, 424 (5th Cir. 1996).

We decline to consider Melendrez's arguments that the district judge should have recused himself, because Melendrez did not properly seek recusal in the district court. See United States v. Sanford, 157 F.3d 987, 988-89 (5th Cir. 1998). The district court's judgment is AFFIRMED.

Melendrez has also filed a motion to supplement the record. However, the items he offers in supplementation are already in the record. His motion to supplement is DENIED.

In his brief, appellee Tony Quintanilla has asked for an award of costs for a frivolous appeal. Because he did not file a separate motion as required by Fed. R. App. P. 38, we refuse to consider the request.

DISMISSAL AFFIRMED; MOTION DENIED.